DATE: May 7, 1998
CASE NO.: 96-INA-00249

In the Matter of:

COMPUTER PEOPLE
Employer

On Behalf Of:

LEON REES
Alien

Appearance: David M. Sturman, Esq.
For the Employer/Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 14, 1994, Computer People ("Employer") filed an application for labor certification to enable Leon Wilson Rees ("Alien") to fill the position of Analyst/Programmer (AF 175-211). The job duties for the position are:

> From client requirements provide specifications. From specifications participate in analysis, design, development, testing, documentation and implementation of required software.

The requirements for the position are completion of High School and two years' experience in the job offered or two years' experience in the related occupation of EDP. Other Special Requirements are experience must include 1) JBA; 2) AS/400; 3) RPGIII/400 and CL; and, 4) Manufacturing or Distribution Software Applications.

The CO issued a Notice of Findings on December 6, 1994 (AF 171-74), proposing to deny certification on the grounds that the Employer has stated vague other special requirements, as they appear in a truncated and abbreviated form not clearly explained or understood by the CO in violation of 20 C.F.R. § 656.21(b)(2) and (b)(5). The CO notified the Employer that it must clearly explain the requirements, document that they are essential to perform the duties of the job offered, and document that they are a statement of its actual requirements for the job offer.

Accordingly, the Employer was notified that it had until January 10,1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated December 29, 1994 (AF 164-70), the Employer explained each of its truncated and abbreviated special requirements, and contended that it did not have "the ability, resource or time to provide training" in each of the areas and therefore they were true minimum requirements. The Employer also stated that "[n]one of the requirements are rare and they are all widely available in the United States, and provided a highlighted copy of "Midrange Systems" and independent newspaper sent to clients utilizing such systems to support its assertions.

The CO issued a Supplemental NOF on February 13, 1995, (AF 158-60), denying certification because a "lack of clarity" remains with respect to the other special requirement of "JBA" because it is still unknown what the acronym translates to, and has referred to JBA in its rebuttal as both "a software development company" and "a new proprietary integrated software

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

system." The CO further found that the Employer's rebuttal appears to explain "JBA" and "Manufacturing and Distribution Software Applications" are designed to accomplish the same or similar tasks, so the Employer is required to explain with specificity why both requirements are necessary, and why a U.S. worker with knowledge in one of the areas could not readily be trained in the other. The CO also noted that this is one of three applications submitted by the Employer for the same occupation, with one being withdrawn at the local office level, and the other two aliens report having worked for JBA UK Ltd., and all three report having worked with JBA, making it appear as though the Employer is tailoring its requirements to the Aliens' backgrounds as JBA is a proprietary software widely used in England and/or Europe, and U.S. workers would not likely have experience with it. The CO also noted that the Alien is involved in a "project" with Technicolor, and projects may be temporary, so the Employer must document that its position is permanent and full-time pursuant to 20 C.F.R. § 656.3. Based on the foregoing, the CO found the Employer was in violation of 20 C.F.R. §§ 656.21(b)(2), (b)(2)(ii), (b)(6), and 656.20(c)(8).

Accordingly, the Employer was notified that it had until March 20,1995, to rebut the findings or to cure the defects noted.

The Employer issued a Supplemental Rebuttal on March 1, 1995 (AF 72-157). The Employer described JBA as "an integrated software system" and noted skill with this system was normal within the industry and consistent with the *Occupational Outlook Handbook* (OOH). The Employer also stated that it had not tailored the requirements to the Alien's background, as the requirements are supported by the OOH, by the JB Corporation and by Technicolor, the client. The Employer provided letters from Technicolor and JBA supporting its position as well as a JBA monthly report showing the availability of JBA training in the U.S., a JBA sales brochure showing a wide range of its applications, a Syllabus of training to show the complexity of JBA, and a partial copy of the *Midrange Systems* sales publication showing a JBA marketing ad.

The CO issued the Final Determination on May 31, 1995 (AF 51-71), denying certification because the Employer states in its supplementary rebuttal the required experience in Manufacturing or Distribution Applications means experience in the "ability to evaluate how manufacturing businesses operate, utilize software, and how problems can be solved using manufacturing/distribution software," and the "knowledge required to effectively communicate user management leading to development of specifications." The CO found that the application does not specifically state or require U.S. workers to have such knowledge and therefore it did not detail the minimum of education, training and experience necessary to perform the job duties, and is changing the requirements in violation of 20 C.F.R. § 656.21(b)(2). The CO also found that the Employer did not effectively demonstrate that JBA is indispensable for performing the job duties, or why it is so different than experience in manufacturing or distribution applications, and does not demonstrate that it is infeasible to train U.S. workers in JBA if they possess experience in manufacturing or distribution applications. The CO found that the letters from JBA and Technicolor provided only unsubstantiated assertions regarding the need for JBA, or the difference between experience in JBA and experience in manufacturing or distribution applications. Moreover, the CO also found that the Employer did not adequately document that the position was permanent and full-time as it is a "project" for Technicolor, which the Employer rebutted would involve "ongoing enhancement and maintenance," which

was also not required or mentioned on the application. The CO also found the Employer did not support its assertions that applications in similar situations have been approved, and the *Midreange Systems* article did not demonstrate an exclusive relationship between JBA, RPG, and the AS/400.

On July 5, 1995, the Employer requested review of the denial of labor certification (AF 1-60). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

20 C.F.R. § 656.21(b)(2) specifies that the employer "shall document that the job opportunity has been and is being described without unduly restrictive job requirements" and that the job opportunity's requirements shall be those normally required for the job in the U.S. "*unless* adequately documented as arising from business necessity." 20 C.F.R. § 656.21(b) (2)(i) (emphasis added). At issue here is whether the Employer's requirement of experience with JBA is unduly restrictive, whether the Employer has adequately documented the business necessity of such a requirement, and whether the Employer has adequately documented the position is permanent and full time.

Unduly Restrictive Requirements:

The CO contends that the Employer's requirements of experience with "JBA" and experience with "manufacturing or distribution applications" are similar, and that the Employer must show why a U.S. applicant with experience in "manufacturing or distribution applications" could not perform the job duties even if he had no experience with "JBA," which is apparently tailored to the Alien's background. In the supplemental rebuttal, the Employer again asserts that the requirement is "critical" and also provides letters from the Vice President and Chief Information Officer of Technicolor which also asserts that "knowledge of and experience in modifying JBA applications software," is "mandatory" (AF 86-87). The Employer also provides letter from a Sales manager from JBA which asserts that JBA experience is required for individuals who support businesses which use JBA software and "general knowledge of manufacturing and distribution systems is not sufficient to be effective" in working "in a JBA software environment" (AF 90).

Where an employer's business is in a technically complex field, the labor certification process could be open to abuse by an employer who obscures the job requirements in jargon and technical language. Consequently, the employer's burden of proof may be more difficult to meet since the employer must present its case in a manner that can be understood by the reviewing official. See *Emerson Electric Co.*, 90-INA-486 (Feb. 19, 1992); *Baskt International*, 89-INA-265 (Mar. 14, 1991). This is especially true in this case, where the requirement of experience with JBA, "an integrated software system" used primarily in England and Europe, is not likely to be found in U.S. workers. Although the Employer's written assertion constitutes documentation that must be considered for the purposes of rebuttal under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Id.* Thus, we agree with the CO that the Employer's

assertion that JBA experience is critical, does not adequately document the necessity of the requirement, nor do the letters from Technicolor and JBA which re-assert the necessity of the requirement without specifying why. Unsupported conclusions are insufficient to demonstrate that job requirements are supported by business necessity. *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989), citing *Tri-P's Corp.*, 88-INA-686 (Feb. 17, 1989). Moreover, none of the Employer's evidence adequately documents why a U.S. applicant with experience in other management and distribution software systems could not perform the job duties with a reasonable period of on-the-job training. *The Weck Corporation d/b/a Gracious Home*, 93-INA-35 (Mar. 8, 1995); *Mindcraft Software, Inc.*, 90-INA-238 (Oct. 2, 1991). Accordingly, we find that labor certification is properly denied on this issue.

As labor certification has been properly denied, the other issues of this case are rendered moot.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of May 1998, for the Panel

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service

of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.